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A. Cox & D. BOK, Cases and Materials on Labor Law (5th ed. 1962) 20, 21

promptly be placed into effect. The decision of the recognized local boards shall continue in effect. The rejection of the consideration of an appeal by the Appeals Board is not to be construed as constituting any ruling on the merits of a dispute nor does it prejudice a further request for consideration of an appeal on a similar case in the future.

6. In exercising its discretion as to whether or not to accept a particular appeal, the Appeals Board will give consideration to such factors as the significance of the dispute, the frequency with which such disputes have arisen, the contribution a decision may make to the resolution of disputes and the improvement of relations, and the reasons advanced for considering the appeal. The Appeals Board may not be able as a matter of time to consider all requests for appeal, particularly in its early stages of operation, and accordingly must establish some priority among possible appeals. The Appeals Board is authorized, subject to the approval of the Joint Negotiating Committee, "to prescribe rules as to the types of cases which it will accept for review"; the Appeals Board may establish such types of cases in the future.

7. When the Appeals Board has decided to accept an appeal, it shall promptly set a date for the consideration of the case and notify all involved parties. The Appeals Board shall indicate the date and place of any hearing or specify other procedures it will follow in considering the appeal.

8. The decision of the Appeals Board shall

be communicated to all involved parties; its decision shall be complied with at once.

9. The decisions arising from appeals handled under the procedures outlined above shall apply to the particular jobs involved in the appeal and shall not be considered as a part of the record as defined in Article III, Section 1 (c) of the Plan.

10. All problems of work stoppages or procedural questions regarding assignments of work shall be handled by the Joint Board.

Local Recognized Boards

The Appeals Board requests each of the recognized local plans for settlement of jurisdictional disputes (New York, Chicago and Boston) to provide full information on procedures and standards used in the making of decisions. The Appeals Board may seek conferences with the recognized local boards to facilitate the handling of disputes and to reduce the number of appeals.

Hearing Panels—National Decisions

1. Article III, Section 2 of the Plan provides:

"When a dispute is filed with the Appeals Board by a National or International Union, with a specific request for a decision on a national basis which would become part of the record, the Board shall review the request, and if the Board finds it is an issue not already determined on a national basis by a decision or agreement of record, it shall refer the issue to the Impartial Umpire who shall call a con-

ference of the General Presidents of the Unions involved for the purpose of determining whether or not a national agreement is possible. If an agreement is concluded and properly signed by the contesting parties and attested by the Impartial Umpire, the terms and provisions of the agreement shall remain in effect as per the provisions of the Constitution of the Department. In the event that the dispute cannot be settled by agreement or is not settled by agreement at the end of six months, the Impartial Umpire shall docket the case for hearing and decision by a hearings panel. . . ."

The Plan further provides:

"In negotiating national agreements between international unions, consultation with the appropriate management groups on the making of agreements between international unions is desirable and should be carried on."

2. Article III, Section 5 of the Plan provides:

"The Joint Board may at its discretion and after conference between contesting unions, held by the Chairman of the Joint Board, refer a repetitive dispute which it finds not to be governed by a decision or agreement of record to the Impartial Umpire for mediation and the establishment of a hearings panel and a national decision."

The above Statement of Procedures of the Appeals Board as hereby amended were confirmd by the Joint Negotiating Committee on October 6, 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-63

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

No. 70-65

TEXAS STATE TILE & TERRAZZO COMPANY, INC. ET AL., *Petitioners*

v.

PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT, PLASTERERS' LOCAL UNION NO. 79

STATEMENT OF THE CASE

A. Facts

For the purposes of argument in this Court, a detailed statement of the facts is unnecessary. Generally, the NLRB's statement (Brief at 4-7) is accu-

rate,[1] but neither it nor the Petitioner Texas State Tile do justice to the decision of the Court of Appeals.

B. National Labor Relations Board Proceedings

Although the NLRB stated in its decision that it weighed all the relevant factors presented, it ignored certain factors stressed during the hearing (*e.g.*, A. 183-95),[2] and generally implied it was giving controlling weight to the collective bargaining agreements between the Tile Setters and the employers (A. 23). The NLRB affirmed the employers' assignments to the Tile Setters.

C. The Decision of the Court of Appeals

The Court of Appeals (Judge Leventhal joined by Judge McGowan, with Judge MacKinnon dissenting) refused to enforce the NLRB's order. The court relied on this Court's decision in *NLRB* v. *Radio and Television Broadcast Engineers Union,* 364 U.S. 573 (1961),[3] the language of the statute and the legislative

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[1] One significant omission is that when the Tile Setters continued to claim that they did not fully understand the Joint Board award of November 9, 1966, the Plasterers requested the Joint Board to clarify its earlier award (A. 365; 331, 334-43). The Joint Board, on March 15, 1967, clarified its award with a detailed exposition of the work assigned to each trade under any circumstances (A. 365; 341-43, 324-26). The decision of the Joint Board did not award the Plasterers all the work that was claimed. The Joint Board recognized "the problems created by having two different trades working at the same time on separately identifiable work operations," so, "in the interest of efficient job operation," it assigned the work based on method of installation (A. 365 n.6; 341-42). The picketing on the Martini job occurred two days after the Joint Board issued its clarification (A. 366).

[2] The "Guide Specification" referred to in the testimony is part of the record as Plasterers Exhibit 20P.

[3] Hereinafter referred to as "*CBS.*"

history, to find that the Board lacked authority under § 10(k) "to determine the merits of a jurisdictional dispute between two unions when the unions had agreed on a method for binding arbitration of their disputes"—here, the Joint Board (A. 370). The court immediately recognized that in *CBS* this Court settled the meaning of the word "dispute" in § 10(k) as being the "dispute between two or more groups of employees" (A. 374), and that it necessarily follows that the "parties" to the dispute are the disputing unions or groups of employees. The court held that under § 10(k) an employer is not a party to the jurisdictional dispute and therefore he is not indispensable to the voluntary adjustment mechanism.[4]

Tracing the legislative history, Judge Leventhal found that the scheme of the Act commands the result reached, and furthermore, that policy considerations reinforce his conclusion that the voluntary mechanism clause of § 10(k) is meant to be operative once the disputing unions agree on a method of settlement of their dispute.

Judge MacKinnon, in dissent, was persuaded by the NLRB's twenty-one years of contrary administrative precedent, and viewed the legislative history and a "singe sentence in a 1961 Supreme Court decision [*CBS*]" (A. 389) as not supporting the conclusion of the majority.

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[4] In view of its ruling, the Court did not have to reach the actual merits of the jurisdictional dispute between the unions (A. 362 n. 3).

SUMMARY OF ARGUMENT

I

The starting point in any case of statutory interpretation is the language of the statute. The issue here is whether an employer is a *sine qua non* to the voluntary settlement procedures expressly contemplated by § 10(k) of the Act. This turns on whether "parties to the dispute" refers to the inter-union controversy over who is entitled to take up the work assignment issue with the employer, or to the broader employer-union controversy over the work assignment. The NLRB doctrine depends on the latter view, which encompasses the theory that "dispute" means the jurisdictional strike. The last sentence of § 10(k) states that the charge will be dismissed upon compliance by the "parties" to the § 10(k) award. But the employer can be in "non-compliance" by resisting the union's demand, and yet the charge will be dismissed. It follows that Congress did not consider the employer a "party." Also, the "dispute out of which such unfair labor practice shall have arisen" cannot refer to the jurisdictional strike, for that strike *is* the unfair labor practice. Thus the "dispute" from which the strike "arises" can only be the jurisdictional dispute between the two unions.

II

For fourteen years after the Act was passed, the NLRB administered § 10(k) in error. The NLRB's fundamental interpretation of the Act was overturned in *CBS* in 1961. In *CBS* this Court specifically stated that the "dispute" referred to in § 10(k) was the jurisdictional dispute between the two employee groups. This reversed the NLRB's theory that an

equivalence between "strike" and "dispute" permitted the NLRB to limit the § 10(k) inquiry to whether the union could strike because of an NLRB order or certification. The *CBS* rationale thus controls this case.

The legislative history is in full support of *CBS* and contrary to the NLRB doctrine. Reference upon reference is made to the fact that § 10(k) was intended to cover disputes between two unions. The voluntary adjustment clause of § 10(k) is supported on the ground that it will stimulate unions to set up appropriate machinery to settle such controversies within their own ranks. No one suggests that employers will be a necessary party to this machinery.

The theory of the Taft-Hartley Act is non-interference by Government in substantive employment conditions. The work assignment issue is of central importance to employees, because job security depends upon it. Congress recognized the dilemma of an employer caught in a strike between two unions over a work assignment: the employer has no option open to resolve the issue. Thus Congress set out to extract the inter-union aspect of the work assignment controversy. One union is taken out of the picture by inter-union settlement, or as the compulsory alternative, by a § 10(k) hearing. The NLRB's doctrine that the employer is an indispensable party to the voluntary settlement needlessly destroys the unions' right, guaranteed by § 10(k), to settle their dispute short of administrative arbitration. The employer has no interest to protect since he is not bound by the § 10(k) decision.

III

The NLRB's obedience to consistency highlights its error. The doctrine began as a footnote in an NLRB

case, devoid of any analysis. It has always been an issue ancillary to the NLRB's understanding of § 10 (k) which was reversed in *CBS*. The failure to reconsider the doctrine after its underpinnings were removed by *CBS* destroys any entitlement to judicial respect.

The NLRB doctrine actively induces employers not to participate in voluntary adjustment procedures. Where an employer refuses to so participate, he not only has a chance that his preference will be upheld in the inter-union settlement, but he has over a 95% probability of having his preference upheld by the NLRB. The results are twofold. The employer is induced to stay away from the only procedure which will bind him and bring complete industrial peace, and when the NLRB does overturn the inter-union settlement, as *CBS* feared, the disappointed losing union will probably continue to harass the employer short of striking.

Petitioners argue that it is inherently unfair to "bind" the employer to a voluntary settlement in which he has not participated. Forced to admit the employer has no legal obligation to comply with the voluntary settlement even if the NLRB defers to it, Petitioners argue the employer is "bound practically" because the winning union can strike over the work assignment. In its zeal to protect the employer, the NLRB has not only made an unsupported assumption of union power, but by administrative fiat has taken from the union what Congress could not be persuaded to take in 1947.

ARGUMENT

INTRODUCTION

Between 1949 and 1961, a line of NLRB cases developed holding that the NLRB need make no affirmative award between two unions in a § 10(k) hearing. An ancillary holding in that line of cases was that the employer is an indispensable party to a pre-§ 10(k) voluntary settlement. In *CBS* this Court unanimously reversed the NLRB's refusal to make an affirmative assignment, thereby overturning the NLRB's fundamental understanding of § 10(k). Since *CBS,* the NLRB has nonetheless continued to adhere, without re-examination, to its ancillary doctrine that the employer is a *sine qua non* to any "voluntary adjustment of the dispute." That doctrine is at issue in this case.

In Part I, below, we show the NLRB's adherence to this doctrine is inconsistent with the language of § 10(k); and in Part II that it is inconsistent with (a) *CBS*; (b) the legislative history; and (c) the underlying theory of the statute. In Part III, we show the NLRB's doctrine is contrary to a policy of industrial peace and stability through the private settlement of disputes, and that Petitioners' attempt to support the doctrine is unsuccessful.

I. THE LANGUAGE OF § 10(k) IS DISPOSITIVE

The obvious starting point in statutory interpretation is the language of the statute. Section 10(k) states:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of Section 8(b), the Board is empowered and directed to hear and

> determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the *parties to such dispute* submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the *parties to the dispute* with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. (emphasis added.)

The nub of contention in this case is whether the term "parties" includes the employer, and whether the term "dispute" refers to the inter-union controversy over work assignment or to the jurisdictional strike. The terms are mutually dependent. We contend that "parties" refers to two unions arguing between themselves over which one is entitled to do a work assignment, and that "disputes" refers to this argument between the two of them. The NLRB has an expanded definition. It says that "dispute" refers to a jurisdictional strike and thus includes the employer as well as the two unions. The language of § 10(k) cuts squarely against the NLRB in all respects.

The final sentence of § 10(k) settles the issue.[5] It says that the § 8(b)(4)(D) charge will be dismissed if the "parties to the dispute" comply with the decision of the Board in the § 10(k) hearing or the voluntary adjustment. But compliance or non-compliance by the *employer* has absolutely no bearing on this dismissal. If the employer's preference is not upheld, the

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[5] Significantly, in quoting § 10(k), both the NLRB (Brief at 14) and Texas State Tile (Brief at 14, 20) omit the last sentence of § 10(k).

winning union can comply with the § 10(k) decision and strike the employer; the § 8(b)(4)(D) charge against the union will then be dismissed, even though all the time the employer is steadfastly resisting the Board's § 10(k) award.[6] The employer will not be complying in any sense of the word.

The meaning of "parties" and "dispute" does not change between the first and second sentences of § 10 (k). Since compliance by the "parties to the dispute" in the last sentence does not include the employer, obviously "parties to such dispute" in the previous sentence does not include the employer either. This is the short, yet controlling, answer to this case. The NLRB's treatment is clearly inconsistent with the language.[7]

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[6] The NLRB admits this (Brief at 23 n.16).

[7] Texas State Tile argues (Brief at 22-24, 29) that since § 8(b)(4)(D) prohibits a strike over a work assignment to "another trade, craft or class," it meant to extend protection to disputes solely between one union and the employer. The NLRB has held otherwise. *See, e.g., Teamsters Local 107 (Safeway Stores, Inc.)*, 134 NLRB 1320 (1961); *Local 1905, Carpet, Linoleum Layers (Butcher and Sweeney Const. Co.)*, 143 NLRB 251 (1963). But in any event, the argument is misplaced. By this language of inclusion, Congress was merely making sure that a dispute between two militant groups of employees over a work assignment would be covered by § 8(b)(4)(D) without regard to whether or not either group was affiliated with a "labor organization" in the technical sense. The Texas State Tile argument depends on the assertions of its footnote 13 (Brief at 23), that "[t]he unrepresented employees are not an entity, have no organization or structure, and have no background or competence to dispute the union's claim for work or to represent themselves in any dispute-settling mechanism." Such assertion is unwarranted and has no support in the legislative history. Texas State Tile cites no case wherein the NLRB has applied this language of inclusion, thus demonstrating its limited applicability.

Another portion of § 10(k) supports our position:

> [T]he Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen . . . .

If "dispute" equals "strike" (as the NLRB contends), the NLRB will actually "hear and determine" the strike at the § 10(k) hearing. But the procedure doesn't work that way. Only the merits of the inter-union jurisdictional claims are actually decided in the § 10(k) hearing; a subsequent § 8(b)(4)(D) hearing is held to decide if there was a strike or strike threat. The first operative portion of § 10(k) is contrary to the NLRB's definition of "dispute."[8]

The language of § 10(k) refers to the dispute out of which the unfair labor practice "shall have arisen." Most certainly the strike is the actual "unfair labor practice," and no unfair labor practice "arises out of" the strike. After the strike commences, someone will "charge" the commission of an unfair labor practice, and the NLRB may "find" that it has been committed. An actual physical substitution best shows the signifi-

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[8] The Laborers suggestion (Brief at 29-30) (citing *Local 283, UAW* v. *Scofield*, 382 U.S. 205 (1965)) that the employer is a "party" in § 10(k) terms because as a "charging party," in NLRB vernacular, it could intervene in court proceedings, is misplaced. The two notions of "party" are completely unrelated. For example, the NLRB concedes that when the employer responsible for the work assignment is bound to the voluntary settlement procedures, the NLRB, under its present doctrine, will dismiss the § 8(b)(4)(D) charge (Brief at 23 n.16; 28 n.21). But the employer is not necessarily the charging party. In the instant case, if the employer responsible for the work assignment (Texas State Tile) had been stipulated to the Joint Board, no § 10(k) hearing would have been held even though the charging party (Southwestern Construction Company) had never so stipulated.

cance of this; thus if we substitute the term "strike" for "unfair labor practice" the first sentence reads:

> The Board is empowered and directed to hear and determine the dispute out of which such "strike" shall have arisen.

Obviously, "strike" and "dispute" are two different things, and the NLRB's premise that "dispute" includes the strike is wrong.

The dissenting Judge below also claimed that "dispute" refers to "the jurisdictional *strike*" (A. 393; emphasis in the original).[9] The NLRB criticizes the majority opinion for disagreeing with this construction:

> The contrary conclusion of the court below, which construed the term "such dispute" in Section 10(k) as referring to the underlying jurisdictional dispute, ignores the fact that, under the statutory scheme, Section 10(k) does not become operative unless the union seeking the work has implicated the employer in the jurisdictional controversy by exerting strike pressure against him. (footnote omitted) See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263-264. (NLRB Brief at 26).

[9] The only argument the NLRB (Brief, at 26-27) makes in support of its reading of the § 10(k) language is that §§ 8(b)(4)(D) and 10(k) do not become operative until there is a strike, therefore (according to the NLRB), the employer is obviously a "party" to the "dispute." See also Texas State Tile Brief at 20-22. While the premise is faultless, the conclusion does not follow. We showed above that the term "dispute" could only mean the inter-union dispute, to which the employer is not a "party." Also, Congress did not set out to decide all work assignment controversies; it only stepped in where the employer was the victim of a whipsaw strike. The fact that the strike was made the actual unfair labor practice doesn't mean that the employer is a party to the inter-union dispute out of which the strike arose.

But it is the majority view which is correct, for it was based upon this Court's construction in *CBS*:

> And the clause 'the dispute out of which such unfair labor practice shall have arisen' can have no other meaning except a jurisdictional dispute under § 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer. 364 U.S. at 579.

Judge Leventhal makes perfectly clear that his construction of "dispute" was based upon this passage (A. 374). Yet the NLRB, in disputing Judge Leventhal's view, fails even to accord him the authoritative precedent in this Court on which he relies. Instead, the Board cites a passage from *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263-64 (1964) which addresses itself to a broader notion, and not to the term "dispute" in Section 10(k) at all.[10]

II. THE NLRB's INTERPRETATION AT ISSUE HERE WAS REJECTED IN CBS AND BY CONGRESS AND CUTS AGAINST THE PURPOSE OF SECTION 10(k)

A. CBS

In *CBS* this Court decided once and for all the interrelationship of § 10(k) and § 8(b)(4)(D), thereby correcting fourteen years of NLRB error. In this case, the NLRB is trying to salvage part of the issue lost

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[10] In the cited passage in *Carey*, this Court distinguished between two types of "jurisdictional disputes"—those which deal with work assignments and those that are really questions of representation. The latter, of course, are not governed by § 10(k) at all, but by § 9 of the Act. *Carey* did not consider what Congress meant by "dispute" in § 10(k); nor did it purport to alter the construction of that term in *CBS*. The Texas State Tile contention (Brief at 21, 43) that these opinions somehow cancel each other out is thus without merit.

in *CBS*. That is why the NLRB draws back from the plain language of § 10(k).

Congress had the option in 1947 of flatly prohibiting jurisdictional strikes, but it did not adopt that approach. Congress decided "that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions." *CBS,* 364 U.S. at 576-77. It accomplished this goal by tempering the § 8(b)(4)(D) strike prohibition with § 10(k), which provides that the two unions or the NLRB will, in effect, extract the inter-union aspect from the broader controversy over who will ultimately receive the work. Section 10(k) tells the two unions to put their own house in order by a private settlement,[11] and send back only *one* union to take up the issue with the employer. If the unions cannot settle it themselves, the NLRB decides in a § 10(k) hearing which union is free to dispute the work assignment. The employer is then free to accede to the union's demand, face the union down or compro-

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[11] Both Petitioners, and especially the *amicus curiae* brief of the Laborers, have attacked the National Joint Board. They apparently wish to put this case in a posture where the issue is a preference between the NLRB or the National Joint Board. That is not the issue. There are many conceivable private forums for the settlement of the inter-union disputes, and many industries besides building and construction will be affected by this case. Since *CBS* in 1961, only half of the NLRB's § 10(k) determinations have involved the building and construction industry (Figures obtained from office of the General Counsel, NLRB). The National Joint Board is only one private forum, and this case decides an issue applicable to all. We point out later in this brief that private settlement forums are far preferable to the NLRB in terms of flexibility, speed of decisions and powers of enforcement. See pp. 35-39 *infra*.

mise, or endure a strike. The employer is free of the dilemma of having no open option which will satisfy both unions. The union, on the other hand, is not guaranteed the work assignment.

The NLRB administered the statute in error for fourteen years. It maintained the right to affirm the employer's work assignment in every case except where the employer acted contrary to an NLRB order or certification. The NLRB always sent the union which had the employer's assignment back to take up the issue with the employer. When this doctrine reached this Court in *CBS,* the NLRB's practice was unanimously reversed. This Court recognized that the NLRB practice was the surer way of prohibiting strikes, but held that the Congressional emphasis on settling the inter-union dispute over the work assignment was controlling until legislated otherwise. As the Court put it in *CBS*:

> [Section] 10(k) offers strong inducements to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes. 364 U.S. at 577.

It amplified this statement by saying that in the case before the Court, the technicians' union "failed to reach a voluntary agreement with the stage employees union so the Board held the § 10(k) hearing as required to 'determine the dispute'." 364 U.S. at 577.

Later in *CBS,* the Court said:

> And the clause 'the dispute out of which such unfair labor practice shall have arisen' can have no other meaning except a jurisdictional dispute under § 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled

to do certain work for an employer. 364 U.S. at 579.

This construction of "dispute" was essential to the *CBS* decision. The NLRB was treating "strike" and "dispute" as equivalent and limiting its § 10(k) determination to the narrow question of whether under an NLRB order or certification the union had the right to strike. *CBS* reversed this by holding in the foregoing language that the "dispute" was not the strike, but the controversy between the two unions. As the majority below recognized, once this is established, "it follows that these employee groups are 'the parties to such dispute' for the purposes of determining whether there exists a voluntary adjustment procedure within the abstention provision of 10(k)." *CBS* is authoritative and should govern here.[12]

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[12] The thrust of § 8(b)(4)(D) was again underscored in *National Woodwork Mfrs. Ass'n.* v. *NLRB,* 386 U.S. 612, 625-626 (1967):

> The other subsections of § 8(b)(4) of the Act were similarly limited to protecting employers in the position of neutrals between contending parties. . . . The prohibition of subsection (D) against coercion to force an employer to assign certain work to one of two unions contesting for it protects the employer trapped between two claims. The central theme pervading these provisions of protection for the neutral employer confirms the assurances of those sponsoring the section that in subsection (A) Congress likewise meant to protect the employer only from union pressures designed to involve him in disputes not his own (footnote omitted).

Both the NLRB (Brief at 22) and the Laborers (Brief at 13, 14) cite briefs prepared by Professor Archibald Cox in 1957 when Professor Cox was acting as an advocate for the National Joint Board. They would thus make it appear that Professor Cox supports their position. But Professor Cox was battling against the NLRB's pre-*CBS* interpretation of § 10(k), and the NLRB's myopia forced Professor Cox to take one step at a time. It must be remembered that Professor Cox was acting in a limited role, and could not necessarily give full voice to his view of the legislation.

B. The Legislative History

The legislative history has not changed since *CBS*. The context in which the problem was presented to Congress, the approach of the legislation, and the statements of the Congressmen all support *CBS's* finding that the limited purpose of § 10(k) was to force the two unions to settle their disputes by private or administrative means when the dispute generated a whipsaw strike.

In his 1947 State of the Union message, President Truman asked Congress to adopt labor legislation which would settle the inter-union aspects of disputes over work assignments. He stated:

> Another form of inter-union disagreement is the jurisdictional strike involving the question of which labor union is entitled to perform a particular task. When rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issues. (93 Cong. Rec. 136 (1947)).

The initial House approach was a blanket prohibition of strikes growing out of unresolved disputes between unions.[13] In the Senate, Senator Morse introduced a bill containing the same language as § 10(k), with one exception.[14] Senator Morse made it clear that the pro-

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[13] I Leg. Hist. 78; H.R. Rep. No. 245 on H.R. 3020 (I Leg. Hist. 292, 314). "Leg. Hist." refers to the entire legislative history bound into two volumes by the Government Printing Office.

[14] The bill which passed the Senate proposed the NLRB hear and determine the inter-union dispute just as the present § 10(k) provides but it also permitted the NLRB to appoint an arbitrator to decide the inter-union dispute if the two unions could not agree on a method of adjustment. H.R. 3020, I Leg. Hist. 258-59. In Conference, the authority of the NLRB to appoint an arbitrator to

vision for voluntary settlement of jurisdictional disputes was meant to include only the disputing unions or groups of employees—not the employer. The idea of § 10(k) developed from the Senator's experience with jurisdictional disputes while a member of the War Labor Board. He explained to Congress that the War Labor Board had adopted a policy whereby:

> [W]e would give union leaders involved in jurisdictional disputes 24 hours to proceed to settle the dispute without a work stoppage, and upon their failure to do so we would appoint an arbitrator whose decision would be final and binding. II Leg. Hist. 983.[15]

This was the genesis of § 10(k). Senator Morse wanted the Act to provide the same incentive used by the War Labor Board to encourage disputing unions to agree between themselves on voluntary methods of

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hear disputes was deleted from Section 10(k) without explanation, but the remainder of Senator Morse's provision was retained. See H.R. Conf. Rep. No. 510 on H.R. 3020 (I Leg. Hist. 505, 534, 561). The Conference bill then passed both Houses.

Since the deletion of this item was done without comment, the reason is unclear, but it cannot have the significance which Texas State Tile (Brief at 16, 26-27) attributes, because the direction that the NLRB defer to a private mode of settlement remained unchanged.

[15] Senator Morse added:

> [P]robably one of the greatest benefits that will come from the adoption of such amendments to the Wagner Act as I am proposing this afternoon will be action on the part of the unions themselves to see to it that it does not become necessary, unless in exceptional cases, to resort to the machinery which I have proposed in these amendments . . . because the unions themselves will proceed to establish within their own organizations machinery capable of settling such disputes short of economic action. II Leg. Hist. 983.

settlement of jurisdictional disputes—the Board and arbitrators to be alternatives in the event the unions could not settle their differences.[16] Senator Morse crystallized the meaning of the voluntary settlement procedures of Section 10(k) when he explained his reasons for opposing the Conference bill which did not contain his provision for the appointment of arbitrators in § 10(k). He stated:

> It certainly is true, I am perfectly willing to confess it, Mr. President, that I propose in my bill, and I now defend, a procedure which in the last analysis says to labor, 'If you cannot settle a jurisdictional dispute between the two unions involved without strike action then you must submit that issue to compulsory arbitration.' (II Leg. Hist. 1554).

Senator Murray, in urging the adoption of § 10(k), as proposed by Senator Morse, explained his understanding of the provision:

> We believe this provision of the bill to be sound, and are pleased to note that full opportunity is given the parties to reach a voluntary accommodation without governmental intervention if they so desire. *We are confident that the mere threat of governmental action will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks, where they properly should be settled.* II Leg. Hist. 1046 (emphasis added); See also Sen. Min. Rep. No. 105 on S. 1126 (I Leg. Hist. 463, 480).

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[16] Texas State Tile appears to argue (Brief at 38-39) that Senator Morse only intended to give effect to pre-strike inter-union settlements. If this is so, the voluntary adjustment portion of § 10(k) is rendered meaningless. Section 10(k) is devoid of such a limitation.

In conference the Senate approach was adopted. In recommending adoption of § 10(k), the House Conference Report stated:

> The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine *disputes between unions* giving rise to unfair labor practices under Section 8(b)(4)(D) (jurisdictional strikes). H.R. Conf. Rep. No. 510, on H.R. 3020 (I Leg. Hist. 561) (emphasis added).[17]

Nowhere in the legislative history do we find anyone suggesting that a work assignment decision is a management prerogative deserving protection from union interference. As a contrast, consider the views of the *amicus* brief of the Scientific Apparatus Makers Association. The legislative history is significantly devoid of any similar concern.

C. The Thrust of Section 10(k)

Of course, the language of § 10(k) and the legislative history reflect the sole purpose of federal labor legis-

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[17] See also, II Leg. Hist. 950, 1554 (Senator Morse); II Leg. Hist. 1157 (Senator Smith); II Leg. Hist. 995 (Senator Lucas); and I Leg. Hist. 615 (Rep. Hartley). This Congressional intent is further underscored by the repeated references in the debates to the admissions of many labor leaders that jurisdictional strikes were intolerable situations demanding corrections. *See, e.g.*, I Leg. Hist. 315 (H.R. Rep. No. 245 on H.R. 3020); II Leg. Hist. 1377 (Senator Hawkes). Yet there is no labor leader who would say, or ever has said, that work assignments are not a legitimate interest of unions and that resolution of work assignments (absent an inter-union factor) should not be a proper subject of economic interplay between employers and unions.

lation[18]—to provide a framework free of coercion in which employers and employees can hammer out the terms and conditions of employment. As Professors Cox and Bok have written:

> The Wagner Act left substantive terms and conditions of employment entirely to private negotiation. The Act did not fix wages, hours or other conditions of employment. It did not authorize any administrative tribunal to fix them. When a dispute arose concerning substantive terms and conditions of employment, the Act provided no governmental machinery for its adjustment. The basic theory of the law in its original form, as today, was that the arrangement of substantive terms and conditions of employment was a private responsibility from which the government should stand apart. It was hoped that the process of collective bargaining would result in a lessening of industrial strife, but no one supposed that strikes would not occur. In the end the force which makes management and labor agree is often an awareness of the costs of disagreement. The strike is the motive power which makes collective bargaining operate. Freedom to strike, the threat of strike and possibly a number of actual strikes are, therefore, indispensable parts of a national labor policy based upon the establishment of wages, hours and other terms and conditions of employment, by private collective bargaining. A. Cox & D. Bok, Cases and Materials on Labor Law 133 (5th ed.

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[18] The federal labor legislation of which we speak is the Wagner Act (49 Stat. 449), as amended by the Taft-Hartley Act (P.L. No. 101, 80th Cong., 1st Sess., 1947) and the Landrum-Griffin Act (Labor-Management Reporting and Disclosure Act, P.L. No. 257, 86th Cong., 1st Sess., 1959); these enactments are codified in 29 U.S.C. §§ 141-87. The Landrum-Griffin Act amended the statute in respects not material to this case.

1962). See also *NLRB* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).[19]

The Taft-Hartley Act in 1947 did not change this underlying premise. It did treat certain coercive union tactics, such as violence and intimidation, secondary boycotts, strikes to compel an employer to commit an unfair labor practice, and jurisdictional strikes over work assignments,[20] but as recognized by *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970) and all the commentators, Congress remained careful not to legislate terms and conditions of employment nor to vest power in the NLRB to determine such items. The theory continues to be that the framework of labor-management relations was guaranteed by law, but the hammering-out of matters within that framework was left solely to the participants.

An item within this framework which is of considerable importance to employees is the matter of work

[19] This Court has recognized the basic thrust of the labor Acts in numerous cases. One of the most recent is *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), where the Court stated:

> The object of this [the Wagner] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement (*Id.* at 103-04).

[20] See A. Cox & D. Bok, *supra*, at 142-48.

assignments. See generally, Note, *Automation and Collective Bargaining,* 84 Harv. L.Rev. 1822 (1971). An employee who has spent years learning the skills of a particular job can have his job security threatened by a work assignment. When modernization of technology combines the skills of two different tasks into a single task, the employer must decide which employee will do the modernized work. An unfavorable important work assignment probably means eventual unemployment for the disfavored employee or group of employees, as the case may be. Similarly, where a part of the work done by a skilled employee can arguably be accomplished by a lesser-skilled employee at a lower rate of pay, an employer for financial reasons may want to shift the work away from the skilled employee. This clearly means greater unemployment for this type of worker. Surely no one would deny that the interest of the employees in work assignments is both substantial and legitimate.[21] Favorable wage rates and working hours are of no value when an employee is out of work.

Congress was persuaded in enacting the Taft-Hartley Act that work assignments were too important to foreclose employees from taking the employer to task over this issue, as they do over wages, hours and other working conditions. Employees can try negotiation, conciliation or strike. The Taft-Hartley Act considered only a particular aspect of work assignment controversies: the inter-union dispute.

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[21] The issue is no less important here than in *Fibreboard Paper Products Corp.* v. *East Bay Union of Machinists, Local 1304,* 379 U.S. 203 (1964). The concern of employees in that case was the shifting of work away from them to the employees of another employer. It is of equal concern when the shift is to other employees of one's own employer.

The problem to which President Truman referred was the inter-union aspect of a broader employer-union controversy over work assignments. Employers were repeatedly caught in a cross-fire between two unions over the matter of work assignments. Where an employer faced a work assignment choice between employees represented by different unions,[22] he might be placed in the position where he could do no right. Whether or not he had a preference between the employee groups, the employer had no open options; an assignment to one union necessarily left him at odds

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[22] Petitioner NLRB hints (Brief at 19; also see Laborers Brief at 31) that one of the unions in the inter-union dispute may be a "stranger" to the employer. It is not clear what the NLRB would make of this argument. Since it appears that the NLRB is referring to situations in the building and construction industry, we think the response has been well put by the Harvard Law Review:

> In a subcontracting situation, the general contractor should be considered the assigning employer of all the work done by all employees on a project, including the employees hired by subcontractors. It can be assumed that the general contractor will contract out particular work with an awareness of the association which exists between various subcontractors and certain employee groups and, therefore, can be considered as assigning the work to these employees. Furthermore, since the employees of the subcontractor are all working on the same project and performing work for the general contractor, it does not seem that the interposition of a subcontractor between the general contractor and the employees should affect the applicability of § 8(b)(4)(D). That there are special relationships, calling for special treatment, between contractors, subcontractors, and employees in the building and construction industry has been recognized by Congress in amendments to the Taft-Hartley Act excepting this industry from the general prohibitions against hot-cargo clauses. Note, *Work-Assignment Disputes Under the National Labor Relations Act*, 73 Harv. L. Rev. 1150, 1153-54 n.24 (1960).

with the other union. In the absence of the inter-union aspect, the employer could resolve the work assignment question like any other labor-management controversy—by negotiation or a test of economic strength.

Many references are found in the Congressional debate of inter-union rivalries which put the employer in the position of being hopelessly unable to satisfy his employees.[23] Congress set out to protect the employer from being caught between two warring unions. The problem in drafting the Taft-Hartley Act was how to protect the employer from the inter-union crossfire and still preserve the employees' admittedly legitimate interest in the work assignment controversy. There was a danger of throwing out the baby with the bath-water. A blanket prohibition of strikes would do exactly that. With the strike potential removed, it would have the effect of affirming all employer work assignments and extinguishing the interests of the employee in all work assignment situations.

Another possibility was to vest power in the NLRB to make a binding determination which would settle not only the inter-union dispute but would make a work assignment decision binding upon both unions

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[23] See, *e.g.*, II Leg. Hist. 951 (Senator Morse); II Leg. Hist. 983 (Senator Morse); II Leg. Hist. 1056-57 (Senators Ellender and Morse); II Leg. Hist. 1157 (Senator Smith); "A jurisdictional dispute is one growing out of a dispute between two or more representatives of employees," I Leg. Hist. 583 (Rep. Landis). The House Report on H.R. 3020 states:

> Jurisdictional strikes usually involve quarrels, not between employers and employees, but between rival unions, which use the strike weapon against each other . . . . I Leg. Hist. 292, 315.

and the employer as well. But this option is contrary to Congressional policy of leaving the substantive terms of employment to be exclusively settled by labor-management interaction.

Senator Morse's approach recognized that the employer has a twofold interest in the work assignment controversy. He may have a preference between the two groups of employees, and he also has an interest in being free of the inter-union aspect of the jurisdictional strike. Senator Morse's § 10(k) protects only the latter interest, not the work assignment preference. The only effect of § 10(k) is to take the losing union out of the picture by making it an unfair labor practice for that union to strike. The winning union is not guaranteed the work assignment and thus the policy of government non-interference in substantive terms is preserved. The winning union must still bring its negotiating skill and economic pressure to bear on the employer. Of course, then, in this scheme the employer has no necessary place in the forum where the inter-union aspect of the controversy is settled.

Since Congress declared a limited policy of extracting this inter-union aspect,[24] any procedural rule which interrupts the settlement procedure, or expands the protection, is improper. The NLRB's strained re-

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[24] Indeed, the NLRB admits that the only interest protected by Congress was the freedom from the inter-union aspect of the work assignment controversy. Where the NLRB finds that an inter-union dispute is not a factor, it quashes notice of the § 10(k) hearing. See *Local 1905, Carpet, Linoleum & Soft Tile Layers (Butcher & Sweeney Const. Co.)*, 143 NLRB 251 (1963); *Wood, Wire and Metal Lathers, Local 328 (Acoustics and Specialities, Inc.)*, 139 NLRB 598 (1962); *Teamsters Local 107 (Safeway Stores, Inc.)* 134 NLRB 1320 (1961).

quirement is that unless the employer agrees to the private mode of settlement, the private settlement is not worth a whit. This does more than interrupt the Congressionally-recognized private settlement—it frustrates it entirely at the whim of the employer.

Of course, as Judge Leventhal pointed out (A. 371), the significant clue to an understanding of § 10(k) is the fact that the employer is not bound by the NLRB's § 10(k) determination. If Congress had bound the employer, it would mean that Congress was not only extracting the inter-union aspect of the work assignment controversy, but was also deciding the work assignment question itself. Congress had both of these options open to it, but left the ultimate resolution of the work assignment to the employer and one union. Since the sole purpose of the legislation is to extract the inter-union aspect, there is every reason to allow the unions to do it of their own volition, and it is contrary to the purpose of the Act for the NLRB to preclude them by refusing to recognize the voluntary adjustment of the dispute if the employer has not participated.

This destruction of private settlement procedures in favor of administrative action cuts squarely against the thrust of recent Supreme Court decisions. See, *Boys Markets, Inc.* v. *Retail Clerks Local 770,* 398 U.S. 235 (1970); *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261 (1964); Note, *Labor Law—Work Assignment Disputes—Efficacy of Private Arbitral Remedy Without Employer Participation,* 17 Wayne L. Rev. 189, 198 (1971). Yet the NLRB's proffered rationale for giving the employer this unfettered option is that the employer's interest in the resolution of the work assignment must be protected. This is a totally unwar-

ranted expansion of Congressional protection.[25] If Congress had thought otherwise, it would have bound both unions[26] and the employer to the § 10(k) determination and been done with the whole business.

In the words of Justice Frankfurter in a similar context, the NLRB cannot by construction find a broad policy against all jurisdictional strikes "when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." *Carpenters Local 1976* v. *NLRB*, 357 U.S. 93, 100 (1958).

III. NEITHER PETITIONERS' RATIONALE NOR PROFFERED POLICY CONSIDERATIONS HAVE MERIT

This Court unanimously held in *CBS* that Congress has set the policy considerations in § 10(k) and that they may not be undercut by the NLRB. Strictly

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[25] There are innumerable examples of substantial employer economic interests in internal union affairs which Congress has not afforded protection. An employer dealing regularly with a particular local union may be terribly interested in which of two candidates will be elected business agent of the local, but the employer is not allowed to participate.

[26] The NLRB (Brief at 23n.15) appears to suggest that "theoretically" the § 10(k) determination is not even binding on the losing union because of a different standard of proof in the § 8(b)(4)(D) proceeding. If this is the intention, it is not true. Once the § 10(k) determination is made, it is controlling in the § 8(b)(4)(D) hearing; the only question remaining is whether the union has struck or threatened to. See *Carpenters Local 753 (Blount Bros. Corp.)*, 179 NLRB No. 95 (1969); *Local 4, Longshoremen (Aluminum Co. of America)*, 163 NLRB 1039, 1042 (1967); *New York Newspaper Printing Pressmen, Local 2 (New York Times Co.)*, 154 NLRB 1122, 1124 (1965); *Local 3, IBEW (Western Electric Co.)*, 144 NLRB 1318 (1963). The § 10(k) determination absolutely prohibits the losing union from striking over the issue. The employer is left to do whatever he pleases.

speaking, then, the underlying policy considerations of § 10(k) need not be discussed, but that risks suspicion that policy cannot be handled. The NLRB and its supporters emphasize policy, but Judge Leventhal's holding comports far better with the policies of § 10 (k) and so we gladly take up the issue.

A. NLRB Obedience to Consistency Highlights Its Error

As we pointed out in Part I, the starting point of any statutory construction case is the language of the statute.[27] Yet neither the NLRB's nor Texas State Tile's brief begins with a discussion of the language—nor with the legislative history or policy of the Act. Rather, their principal point is that the NLRB has consistently adhered to its interpretation of "parties to such dispute" in § 10(k) since Taft-Hartley was enacted.[28] Far from being persuasive evidence that the NLRB's construction is correct, this unwavering adherence invites skepticism, since the NLRB's practice was developed, without reasoned analysis, as an ancillary issue in a now discredited line of cases. Indeed, the doctrine has flourished without any regard for this Court's repudiation in *CBS*[29] of the NLRB's fundamental understanding of § 10(k).

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[27] "Most relevant, of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate." *Carpenters Local 1976* v. *NLRB*, 357 U.S. 93, 100 (1958).

[28] A like argument was unsuccessfully advanced in *CBS*, 364 U.S. at 585.

[29] In *CBS* the Court pointed to inconsistency between the Board's regulations and its decisions. The practice here is inconsistent in statutory approach with another line of Board authority beginning with *Safeway Stores* discussed at n.7, *supra*. Also, as the court below pointed out, when Congress amended the Taft-Hartley Act in certain particulars in 1959, it did not address itself to §§ 8(b)(4)(D) or 10(k). (A. 379)

In none of the cases cited by the NLRB,[30] Texas State Tile [31] or the dissenting opinion below [32] as evidencing NLRB practice, did the NLRB give reasoned explanation for its interpretation of "parties to such dispute". These cases all trace back to *Los Angeles Bldg. & Constr. Trades Council (Westinghouse Electric Corp.)*, 83 NLRB 477, 482 n.7 (1949).[33] After *Westinghouse,* all NLRB cases dispose of the issue by simply declaring it to be controlled by NLRB precedent.[34]

The discussion in *Westinghouse* reads in full:

> As Westinghouse was not a party to any AFL awards of jurisdiction, we find no merit to the Trades Council's contention that such awards in its favor are determinative in this case. 83 NLRB at 482 n.7.

This is hardly the type of reasoned statutory analysis by an administrative agency which is entitled to judicial respect.

What is even more extraordinary than the absence in the NLRB decisions of any analysis is that the NLRB should have failed to examine its present rule

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[30] NLRB Brief at 15 n.6.

[31] Texas State Tile Brief at 16-17.

[32] A. 387 n.1.

[33] Cited only in the Texas State Tile Brief. *Westinghouse* is the earliest case cited by Petitioners, except for the two inapposite decisions cited at the end of n.6 on page 15 of the NLRB brief which were overruled by *CBS*.

[34] Thus, for example, the first case cited by the NLRB (Brief at 15 n.6) is *Local 231, Hod Carriers (Middle States Telephone Co.)*, 91 NLRB 598, 604 (1950). This case simply cites *Westinghouse Electric, supra.*

after *CBS* corrected the NLRB's fundamental misunderstanding of § 10(k). After all, the precedents carry their own death wound. They flow from an approach to the statute which has already been discredited: The single footnote in *Westinghouse,* which is the origin of the entire body of administrative practice, follows text stating and applying the very rule of law at issue in and reversed by *CBS*. Respect for the opinions of this Court should have counseled reexamination by the NLRB of its practice in light of the authoritative analysis of the statutory provisions which it purports to apply.[35] In short, the NLRB asks this Court to give greater weight to the NLRB's administrative practices than the NLRB has been willing to give the decisions of this Court.

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[35] The Petitioner claims (NLRB Brief at 16; Texas State Tile Brief at 17) that the NLRB's interpretation in issue here "has tacitly been accepted" by and "favorably relied upon" by courts of appeals. Judge Leventhal more accurately noted, "the precise question before us is, in any meaningful sense, one of first impression in the federal courts" (A. 372). A review of those cases supports Judge Leventhal's view: In *NLRB* v. *Local 825, Operating Engineers,* 410 F.2d 5 (3rd Cir. 1969), rev'd on other grounds, — U.S. —, 27 L. Ed. 2d 398 (1971), the unions *and* the employer were stipulated to the Joint Board. In *New Orleans Typographical Union, Local 17* v. *NLRB,* 368 F.2d 755 (5th Cir. 1966), there was no agreement between the unions for a voluntary adjustment of their dispute. The court in *NLRB* v. *Local 825, Operating Engineers,* 326 F.2d 213 (3rd Cir. 1964), found that only one of the *unions* involved in the dispute had agreed to the voluntary adjustment of the dispute. Finally, *Local 450, Operating Engineers* v. *Elliott,* 256 F.2d 630 (5th Cir. 1958) was an appeal from a § 10(1) injunction where the court did not have to reach this issue. *Quinn* v. *NLRB,* 61 LRRM 2690 (D.C. Cir. 1966) is not on point. See Judge Leventhal's discussion, A. 383-84).

B. The NLRB Is Intruding on the Domain of Congress

Certainly in some situations the employer has an economic interest in the resolution of the work assignment.[36] But Congress did not let the employer "have it both ways," as the NLRB would permit. If the employer wishes to have the work assignment settled once and for all he can join with the two unions in a *binding* voluntary settlement procedure. He does not do so by going to the NLRB, where he isn't bound. As Judge Leventhal stated, "[a]n employer properly has standing under these provisions when he is plagued by employee groups that do not agree, and not when he is dissatisfied with the way they do agree." (A. 383).

Most significantly, the NLRB[37] is forced to fall back on the following argument to sustain its position:

> [I]t is highly unlikely that Congress designed a structure for settling these disputes *that would bind the employer to a settlement* to which he was not a party and in which he had no voice. Indeed, the notion that a party with a direct interest in a controversy (*particularly one whose outcome will require specific action by him*) is entitled to be heard in the settlement of that controversy is basic to our concept of fair procedure . . . . (NLRB Brief at 19-20) (emphasis added).

The NLRB's position on the § 10(k) language and the policy of the Act depends on this view, and it is wrong. When the employer is not bound to the inter-union settlement, its outcome requires no "specific action" by him. If the inter-union settlement does not accord

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[36] *See also* Laborers' Brief at 19-20.

[37] *See also* Laborers' Brief at 19-20.

with his preference on the work assignment, he has no obligation in law or fact to implement its result.

Texas State Tile's[38] similar reliance suffers from the same infirmity. *Transportation-Communications Employees* v. *Union Pac. R.R. Co.*, 385 U.S. 157 (1966)[39] is important for the contrast of legislative scheme involved there with the one at issue in this case. Under the Railway Labor Act, the Railroad Adjustment Board is assigned the task of making a substantive grievance determination in a compulsory arbitration between employer and union. The decision is binding on the employer, and the procedure specifically includes him. By contrast, no compulsory binding decision on the employer is made under the Taft-Hartley Act. The distinction in purpose between the two Acts explains why the requirements are, and must be, different.

Petitioners[40] are thus forced to the heart of their position, which is that practically speaking the em-

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[38] Texas State Tile Brief at 32-36.

[39] Texas State Tile misconceives the California cases cited in its brief at 33. There employers and unions arbitrated the effect of contracts on a second employers who were not bound to the arbitrations. The California court did not hold that the arbitrations violated due process, it held that the results of the arbitrations could not be enforced in a court of law against the second employers. In the situation under § 10(k), the employer has no legally enforceable obligation placed against him by the inter-union procedure when he has not stipulated to be bound. He can resist the union which prevails in the inter-union settlement, and no § 301 contract liability accrues against him. If the California cases are taken as overturning the arbitration itself on due process grounds, then the cases have been implicitly overruled by *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964).

[40] NLRB Brief at 23; Texas State Tile Brief at 33.

ployer is bound by the § 10(k) determination for if he disagrees with it, he will be at the mercy of the striking union. This fundamental premise of the NLRB is wholly unwarranted. It is the province of Congress, not the NLRB, to determine whether the unions enjoy such economic power that employers must have this sort of protection. Congress was not so persuaded in 1947, and the NLRB may not amend the statute by administrative fiat. This case "affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what Congress has enacted." *Carpenters Local 1976* v. *NLRB supra*, 357 U.S. at 100.

C. The NLRB's Doctrine Disrupts Industrial Peace and Stability

As *CBS* recognizes, the purpose of § 10(k) is to encourage unions to settle jurisdictional disputes between themselves short of enmeshing the employer; thus the section "offers strong inducements to quarrelling unions to settle their differences . . ." 364 U.S. at 577. The NLRB doctrine in this case cuts the other way. Unions are persuaded not to settle voluntarily, since their employer can unilaterally void the settlement by demanding a second hearing, this time before the NLRB.

The employer is induced by the NLRB *not* to enter into the voluntary settlement procedure. As long as he refuses to participate and be bound by the inter-union settlement procedure, the employer substantially increases the ultimate chances that the work assignment will go his way. The union receiving the employer's initial assignment of the work will

always argue the employer's side of the case in the voluntary settlement proceeding. Assuming the employer stands a 50% chance of having his work assignment affirmed in the voluntary settlement proceeding[41] and another 50% chance before the NLRB, he increases his overall chances to 75% by refusing to join in the private settlement.

In fact, the employer is offered a far greater inducement. The NLRB's dismal record of fairness in making § 10(k) determinations suggests the degree to which the NLRB has refused to comply with *CBS*. From the *CBS* decision in 1961 through December 31, 1970, the NLRB made 349 § 10(k) determinations. It affirmed the employer's assignment in 95.1% of the § 10(k) cases. Of these cases, 171 involved construction industry disputes. The NLRB there affirmed 96.5% of the employers' assignments.[42] Judge Leventhal posits that this routine affirmance of employers' assignments results from the fact that the employer is not bound to accept the § 10(k) determination (A. 380-81).

Commentators[43] have also concluded that the NLRB has not changed its pre-*CBS* policy. The American

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[41] The employer may have less than a 50% chance in the voluntary settlement because if his initial assignment was demonstrably correct, the union would never have raised the issue. This also explains the figures of the National Joint Board in affirming employer assignments (the figures are quoted in the appendix to the Laborers' Brief). Since that Plan is of long standing, most employers make assignments according to the established rules.

[42] Figures obtained from the Office of the General Counsel, NLRB.

[43] *See* Atleson, *The NLRB and Jurisdictional Disputes: The Aftermath of CBS*, 53 Geo. L.J. 93, 117-21, 133-34, 150-51 (1964); Cohen, *The NLRB and Section 10(k): A Study of the Reluctant Dragon*, 14 Lab. L.J. 905, 917 (1963); Hickey, *Government Regulations of Inter-Union Work-Assignment Disputes*, 16 S.C. L.Rev.

Bar Association's Special "Committee on the Building and Construction Industry" after making a review of the cases and statistics, reached the same conclusion as other commentators that "the Board has ignored or juggled the factors before it in a given case, often inconsistently, to reach an apparently preconceived result." Report, A.B.A. Section of Labor Relations Law, Report of the Special Committee on the Building and Construction Industry 452, 455 (1965). With such a record, the NLRB should not suggest[44] unions and employers would flock to private settlement forums if only those forums were as equitable as the NLRB.

This inducement is all the more unfortunate because the voluntary means of settlement are far superior to the NLRB's § 10(k) procedure. The private settlement is the only way of bringing about a permanent resolution of the dispute because the § 10(k) determination never binds the employer.[45] Judge Leventhal

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333, 387 (1964); Note, *Jurisdictional Disputes Since the CBS Decision*, 39 N.Y.U. L.Rev. 657, 681-85 (1964). *See also* Feldacker, *Subcontracting Restrictions and the Scope of Sections 8(b)(4)(A) and (B) and 8(e) of the National Labor Relations Act*, 17 Lab. L.J. 170, 176 n.28 (1966).

[44] NLRB Brief at 29-30.

[45] Some unions, described as "imperialistic" (K. STRAND, JURISDICTIONAL DISPUTES IN CONSTRUCTION: THE CAUSES, THE JOINT BOARD, AND THE NLRB, 39-40 (1961) attempt to expand their jurisdiction at the expense of other unions. When they are parties to an inter-union settlement procedure such as the Joint Board, conflicts inevitably arise between their expansion goals and their contractual commitments to their sister unions. The latter problem is neatly sidestepped by assistance, unwitting or otherwise, from the employer who refuses to become bound to the Joint Board and insists on a § 10(k) determination. Having obtained the initial assignment from the employer (many times by pressure), the imperialistic union (despite a contrary Joint Board award) will prevail in the § 10(k) case before the NLRB (in about 96% of the

pointed out, "[t]he Act does not authorize the Board to compel the employer to change his assignment, or a union to renounce an assignment that the employer is willing to give." (A. 382). Another important consideration is the flexibility that private means of settlement enjoy, which is not shared by the NLRB procedure. When problems arise relating to procedures, awards, or enforcement under a private mode of settlement, the procedures can be quickly changed to accommodate the needs of an industry. Even if it were not for the built-in inflexibility of established administrative procedures, § 10(k) gives the NLRB very little leeway at all. Furthermore, the NLRB's inordinate delay in processing § 10(k) cases shows the inherent difficulty of the administrative procedure. Last year it took the NLRB a median average of 230 days to issue a § 10(k) determination.[46]

As Judge Leventhal also stated (A. 382), the most important attribute of the private settlement is its enforceability short of a work stoppage. The winning union in a voluntary settlement procedure may bring

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cases) over the union which traditionally performed the work, and can blame the whole affair on the NLRB.

Presumably all agreements for private inter-union settlements will and do have similar obligations on the participants. As Judge Leventhal put it, "The impetus for unions to live up to the inter-union agreement rests on reinforcing considerations of honor, reciprocity, mutuality—and enforceability." (A. 382). Congress did not intend § 10(k) to be a tool used by expansion-minded unions to foster jurisdictional disputes. But this is precisely what the NLRB has allowed. In the guise of protecting employer "interests" the NLRB has unwittingly permitted employers to be caught up in a whirlpool of a union's jurisdictional goals.

[46] These figures for fiscal 1970 were obtained from the Executive Secretary's Office of the NLRB.

an action under Section 301 of the Taft-Hartley Act[47] or in a state court "to secure injunctive relief against a union that has failed to abide by its agreement to honor [a voluntary settlement] decision and renounce the work." (A. 382). Even in the interim period while the arbitration award is being enforced, the public interest is safeguarded by a § 10(l) injunction (A. 382). There is no good reason for this procedure[48] to

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[47] There is no problem presented by Texas State Tile's contention (Brief at 31) that if the employer goes along with the inter-union settlement one of the unions can turn on him by filing a § 301 contract damage action. Since the union filing the suit will have participated in the settlement, any court will quickly turn a deaf ear when the union makes a reversal of position vis-a-vis the employer. Any number of legal theories are available, perhaps the most obvious being mutual amendment of the collective bargaining agreement.

Equally without merit are the Laborers' similar arguments. The argument that private settlements will force violations of § 8(a)(3) and § 8(b)(2) (Laborers Brief at 31-32) was made against NLRB determinations in *CBS* and was rejected. 364 U.S. at 584. Since then the NLRB has had no difficulty managing the sections of the act simultaneously. See *Local 502, Hod Carriers (Cement-Work, Inc.)*, 140 NLRB 694 (1963). Congress expressly authorized the private settlement; it could hardly be saying it would violate the Act to employ it. The Laborers' argument proves too much. The Laborers' suggestion (Brief at 30-31) that a union losing the voluntary settlement procedure will be caught between enforcement of the voluntary settlement and a § 301 or § 303 suit by the employer is similarly weak. Numerous collective bargaining clauses will prevent this problem from occurring. Further, the union in this situation is in a problem of its own making; it entered into a commitment to its fellow union and a possibly conflicting collective bargaining agreement with the employer with "eyes open." *See Local 636, Plumbers* v. *NLRB*, 430 F.2d 906, 908 (D.C. Cir. 1970).

[48] The NLRB (Brief at 24-25) complains that a private mode of settlement may not consider all the relevant factors in reaching its determination. Although we seriously question whether the NLRB considers all relevant factors, the argument nonetheless

be frustrated by the NLRB when the NLRB's alternative does not work nearly so well.

Also, this Court has found a second important policy at stake in the enactment of § 10(k); in *CBS* this Court stated:

> For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before enactment of § 10 (k)—with the same old basic jurisdictional dispute likely to vex him, and the rival unions, *short of striking,* would still be free to adopt *other forms of pressure upon the employer.* 364 U.S. at 579-80 (emphasis added).

The NLRB's rule in this case is inconsistent with this policy; it leaves the employer with a union which is determined to harass the employer over the work

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fails for another reason. If Congress had directed the NLRB to make a decision as to who would get the work which was binding on the employer, the factors in making the decision would be of considerable importance from a public interest standpoint. Congress did not set out these factors because, in fact, the NLRB is making no such determination. The NLRB under § 10(k), just as the unions in a voluntary proceeding where the employer is not stipulated, decides only the inter-union aspect of the controversy. There is no binding determination of a work assignment. This is left to be resolved between the employer and the union.

Texas State Tile argues (Brief at 27-28) that a "public interest" supports a determination of the work assignment which will consider "all sides of the controversy", thus making the employer a necessary party. We would agree with this *if* the Congress had set out to decide the work assignment, but it did not. It only extracted the inter-union aspect, leaving even the § 10(k) participating employer unbound. The only final settlement of the actual work assignment comes about through private settlements to which the employer voluntarily binds himself. The NLRB doctrine at issue in this case induces the employer not to do so.

assignment at every opportunity. When the union's victory in the private settlement is snatched away by the NLRB, it is doubtful the union will passively defer to the NLRB relitigation; it will probably, as this Court recognized, "adopt other forms of pressure upon the employer." 364 U.S. at 579-80. Where the NLRB relitigates, industrial strife continues unabated.

At pages 35-36 of its Brief, Texas State Tile[49] says:

> Finally, the Board's construction of Section 10 (k) to require the employer's assent to any voluntary adjustment is consonant with the underlying basis of all the body of arbitration law that has developed as a vital part of national labor policy, *i.e.*, that arbitration is consensual.

On the contrary, this policy militates strongly against the NLRB's construction. The proposition "arbitration is consensual" is not simply part of the "body of arbitration law," it is a part of the basic philosophy of the Act that employees and unions should be free to settle disputes between themselves which affect wages, hours and working conditions. See pp. 20-28, *supra*. The Congressional policy against compulsory arbitration is nowhere more clearly articulated than in Senator Taft's famous speech explaining that the avoidance of compulsory arbitration See II Leg. Hist. 1005, 1007. *Street, Elec. Ry. & Motor Coach Employees, Div. 998* v. *Wisconsin Employment Relations Board,* 340 U.S. 383, 395 n.21 (1951). Yet §10(k) is a form of compulsory arbitration—it is the forced settlement of a dispute by NLRB hearing or private settlement. The central issue here, as in *CBS,* is which dispute Congress chose to submit to com-

[49] The Laborers make the same argument. (Brief at 16-19).

pulsory arbitration under § 10(k): that between two unions over the right to claim work, or that between employer and union over the propriety of an assignment. Once it is acknowledged, as the Petitioners must, that compulsory arbitration of *employer-union* disputes was an anathema to Congress, affirmance of the decision below becomes inevitable.

CONCLUSION

For the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,

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